

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

**Comments of
The Nebraska Rural Independent Companies**

I. Introduction

The Nebraska Rural Independent Companies (“Nebraska Companies”)¹ hereby submit comments in the above captioned proceeding. On June 8, 2004 the Federal Communications Commission (“Commission”) released a Notice of Proposed Rulemaking (“Notice”)² seeking comment on the *Recommended Decision* of the Federal-State Joint Board on Universal Service (“Joint Board”) concerning the process for designation of eligible telecommunications carriers (“ETCs”) and the Commission’s rules regarding high-cost universal service support.³

Specifically, the Commission seeks comments on the Joint Board’s recommendation for adoption of permissive federal guidelines encouraging state commissions to consider additional

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco, Inc., Consolidated Telecom, Inc., Consolidated Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K&M Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Pierce Telephone Co., Rock County Telephone Company, Stanton Telephone Co., Inc. and Three River Telco.

² See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 04-127 (“Notice”) (rel. June 8, 2004).

³ See *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, 19 FCC Rcd 4257 (2004) (“*Recommended Decision*”).

minimum qualifications when evaluating ETC designation requests.⁴ The Commission also seeks comments on the Joint Board's recommendation to limit the provision of high-cost support to a single connection per customer to the public telephone network and recommendations on several related proposals to modify current Commission rules governing the filing of annual certifications and data submissions by ETCs.⁵

II. ETC Designation Process

The FCC Should Adopt Permissive Guidelines for Additional Minimum Requirements for the Determination of ETC Designation as Recommended by the Joint Board, But Recognize That These Are Not All-Inclusive Guidelines. A State Commission May Require Additional Measures Based on State Conditions.

The Nebraska Companies support the Joint Board's recommendation that the Commission adopt a set of federal guidelines that can be used as a guide for the states in determining if the granting of ETC status is appropriate. The Joint Board is correct in its assertion that these federal guidelines be flexible and non-binding on the states.⁶ The Joint Board states that "[e]ach state commission will be uniquely qualified to determine its own ETC eligibility requirements as the entity most familiar with the service area for which designation is sought."⁷ Thus, the Commission must recognize that these guidelines are not necessarily all-inclusive; a state commission is still in position to require additional measures based on state conditions.

The discretion given by Congress to states when examining whether new ETC designations in rural areas are in the public interest clearly indicates Congress' understanding

⁴ See Notice at para. 2.

⁵ Id. at paras. 3-5.

⁶ Id. at para. 41.

⁷ Ibid.

that competition may not always serve the public interest in high-cost rural areas.⁸ It is clear that the Commission also believes competition is not always in the public interest. In its recent *Virginia Cellular* and *Highland Cellular* orders, the Commission concluded that “the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.”⁹ In both of the above mentioned orders the Commission indicates that numerous factors must be included in a public interest determination for rural ETC designation.¹⁰ The Nebraska Companies recommend that by adopting the Joint Board’s permissive guidelines as additional requirements for ETC certification, combined with the states’ ability to impose additional requirements, the Commission can reduce the ambiguity and inequity that has benefited petitioning ETCs in many states.

The Nebraska Companies believe that a focus on mobility offered by wireless carriers is inconsistent with universal service goals. Indeed, the Joint Board, in discussing the single/multiple connection approach noted that mobility is not a supported service.¹¹ This significant increase in the number of ETCs in the country, based on such incomplete public interest analyses, is directly responsible for the significant growth seen in universal service funding requirements over the same time period.

The creation of permissive ETC guidelines by the Commission and the states will encourage more rigorous and thorough reviews and consequently, should result in more targeted

⁸ See Notice at para. 69.

⁹ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, FCC 03-338 (rel. Jan. 22, 2004) at para. 4 and *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, FCC 04-37 (rel. Apr. 12, 2004) at para. 4.

¹⁰ *Ibid.*

¹¹ See Notice at para. 94.

use of limited universal service fund resources. Additionally, the Joint Board believes, and the Nebraska Companies concur, that use of these guidelines will also “allow for a more predictable application process among states.”¹² Under the current system, it is difficult to understand state to state the standards that are used to find public interest determinations in rural areas. These guidelines will also provide a model to ensure comparability of services exists between multiple ETCs. If utilized by the states, this model will assure customers the services provided by all ETCs are indeed comparable.

Finally, it has been argued by wireless carriers that section 332 of federal law would prohibit states from imposing requirements on wireless carriers in regard to the ETC designation process. The Nebraska Companies disagree and assert that section 332¹³ does not impose limitations on state commissions with respect to regulation of wireless carriers when ETC status is an elected condition by such carriers. A state commission is free to exercise any applicable rule as a condition for ETC status determination as long as those regulations are not inconsistent with the Commission rules to preserve and advance universal service.¹⁴ The Utah Supreme Court upheld a Utah PSC ruling which asserted that ETC status is separate from common carrier status and that section 332(c)(3)(A) is not applicable when a common carrier is acting as an ETC.¹⁵ The Nebraska Companies concur with the Joint Board’s recommendation that the Commission clarify its decision in the *Western Wireless-Kansas CMRS* Order whereby the Kansas Corporation Commission was preempted from regulating entry or rates and other

¹² *Id.* at para. 33.

¹³ 47 U.S.C. § 332 (c)(3)(A) and (c)(8).

¹⁴ 47 U.S.C. § 254(f) A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

¹⁵ *WWC Holding Co. Inc. V. Public Service Commission of Utah, et al.*, 44 P.3d 714, 724 (Utah 2002).

conditions as requirements for ETC designation.¹⁶ The Nebraska Companies contend that Section 332(c)(8) does not prevent states from placing any requirements consistent with section 254 on CMRS providers in order to be designated an ETC, a position with which the Joint Board wants FCC guidance.

The Permissive Additional Minimum Requirements in Rural Service Areas Should be Expanded Beyond the List of Supported Services, Including a “Bright Line” Test for ETC Applications.

The Nebraska Companies assert that the analysis of a petition for ETC status in rural carriers’ service areas should begin with the presumption that multiple ETCs cannot be supported due to high costs and low population density. To implement this rebuttable presumption, states should consider adoption of a “bright line” test to identify such service areas where it is presumed that scarce universal service funding cannot justify supporting multiple networks. Joint Board member Billy Jack Gregg, director of the Consumer Advocate Division of the Public Service Commission of West Virginia, outlined such a “bright line” test in his testimony to the House Subcommittee on Telecommunications and the Internet in September, 2003. He stated: “Under this approach, in rural study areas receiving an average of \$30 or more in monthly support the guideline would state that it is presumed that it is not in the public interest to designate more than one subsidized carrier, i.e., more than one ETC. In areas receiving more than \$20 per line in monthly support, but less than \$30 per line, it would be presumed that no more than one additional subsidized carrier should be designated. There would be no limitation on the number of ETCs in study areas receiving less than \$20 per line in support. States would

¹⁶ See Notice at para. 60.

be able to overcome these presumptions by specific evidence about particular carriers or particular areas.’’¹⁷

To test a “bright line” presumption such as that presented by Mr. Gregg, the states should perform a meaningful “cost vs. benefit” analysis on evidence provided by the applicant ETC, with whom the burden of proof shall rest, in which the cost of approving multiple ETCs in an area is weighed against the benefits that will be gained. In this analysis, costs should be defined as the increase in USF funding that will be required, while benefits should be defined as the resulting changes in service that will be available to consumers. If a state finds that the costs exceed the benefits to consumers in particular areas, then a “bright line” presumption would endure. The Nebraska Companies recommend that until the states or the Commission (where it has jurisdiction for the ETC application) have developed and approved such a “bright line” test, it is inappropriate to designate additional ETCs in high-cost areas.

Once it has been determined that a study area qualifies for multiple ETCs under a “bright line” test, the specific ETC application in question must also be found to be in the public interest. The Nebraska Companies believe that the states should apply additional minimum requirements beyond those required by the Act on carriers desiring ETC status. The Act does not prohibit a state from requiring additional criteria including unlimited or defined usage packages,¹⁸ emergency services, the ability to remain functional in emergency situations¹⁹ (e.g. battery backup), requirements designed to assure the public safety and equal access to interexchange carriers (“IXCs”), among others. As they have urged the Commission previously in this docket,

¹⁷ See Hearings before the House Committee on Energy and Commerce on the Future of Universal Service, 108th Congress, 1st Sess., Prepared Witness Testimony of Mr. Billy Jack Gregg, available at: <http://energycommerce.house.gov/108/Hearings/09242003hearing1089/Gregg1717.htm>.

¹⁸ See Notice at para. 66.

¹⁹ *Id.* at para. 61.

the Nebraska Companies believe that state commissions should require all carriers requesting ETC status to provide equal access to IXCs. Currently, wireless carriers are not required to provide a customer with the choice of his/her IXC. As a result, consumers are denied the very choice Congress deemed so important and beneficial as to require its provision by ILECs.

Some Joint Board members recognize the pro-competitive necessity of equal access being provided by all ETCs. Commissioner Martin, in his position as a Joint Board member, noted in his Separate Statement that he would have recommended the Commission require equal access of all ETCs.²⁰ He said that he not only recommends such a requirement, but also that “an equal access obligation is also fully consistent with the Commission’s existing policy of competitive neutrality amongst service providers.”²¹ Commissioner Adelstein also indicated his disappointment in the Joint Board’s failure to address equal access issues. In his Separate Statement, Commissioner Adelstein indicated that he deferred his vote on whether to include equal access in the list of supported services under the belief that said issue would be addressed in this Joint Board proceeding.²²

The Joint Board also recommended that a carrier wishing ETC designation should demonstrate it possesses the financial resources and ability to provide quality service throughout the designated service area.²³ This requirement, if strictly enforced and monitored, will assure that a company is not going to be granted ETC status and draw down on the already taxed

²⁰ See Notice at Separate Statements of Commissioner Kevin J. Martin Dissenting in Part, Concurring in Part (“*Commissioner Martin*”) at p. 67.

²¹ *Ibid.*

²² See Notice at Joint Separate Statement of Commissioners Jonathan S. Adelstein, G. Nanette Thompson, Regulatory Commission of Alaska, and Bob Rowe, Montana Public Service Commission Approving in Part, Dissenting in Part (“*Three Commissioners*”) at p. 75.

²³ See Notice at para. 53.

universal service fund resources yet be unable to reach sustainable operations throughout a service area. A reasonable way to apply this test is to make all ETCs subject to state certification, which includes the requirement of demonstrating financial ability to meet universal service obligations.

ETCs Should Have the Capability and Commitment to Serve All Customers.

Another Joint Board recommendation was to adopt “a guideline encouraging state commissions to require ETC applicants to demonstrate their capability and commitment to provide services throughout the designated service area to all customers who make a reasonable request for service.”²⁴ The Nebraska Companies concur with this recommendation and believe the Joint Board’s assertion enables the states to require this demonstration and commitment to take the form of a build-out requirement to cover the entire service area.²⁵ However, the decision as to whether a request for service is “reasonable” or not must be left to the states, and not the individual carriers, as recommended by the Joint Board.²⁶ The Vermont Public Service Board (“VPSB”) placed a post-certification requirement on a wireless company when it approved an ETC application in June of 2003 (“Vermont Order”). The VPSB said that “the record here provides little assurance that RCC (applicant) will expand its coverage if granted ETC certification. The applicant has promised no more than to ‘look to’ upgrade its facilities with the new money.”²⁷ The Nebraska Companies urge the Commission to endorse the VPSB approach in the final guidelines it adopts. The Vermont Order created a three-step requirement for the applicant once ETC designation was granted. First, the applicant’s capital construction budget

²⁴ *Id.* at para. 54.

²⁵ *Id.* at para. 55.

²⁶ *Id.* at para. 58.

²⁷ See *Vermont Public Service Board ETC Decision re: RCC Atlantic, Inc. d/b/a/ Unicef*, Docket No. 5918, 26 June 2003 (“*Vermont Order*”) at p. 27.

for system expansion in Vermont must increase by the amount of its federal universal service support; at least until the company's Vermont system has reached a level of near universal coverage. Second, the VPSB should expect continual actual improvements in the applicant's signal coverage. And finally, the VPSB requires the applicant to assist potential customers to actually receive service at their place of business.²⁸

In order to ensure compliance with a build-out requirement, the Nebraska Companies recommend the states require completion of the build-out within three years of gaining ETC designation. Without such a requirement, companies could and would delay indefinitely any meaningful build-out in rural, high-cost areas. The Nebraska Companies propose that ETCs provide contour and service signal strength maps to demonstrate the build-out progress.

In making a commitment to serve, the ETC must also demonstrate the ability to serve each customer premise in the service area. The opportunity for "cream skimming" is too tempting without a strong enforcement mechanism in place, as an ETC can merely serve the in-town areas and not the rural farms and ranches. These rural premises are included in the USF amount the ETCs will receive (based on the ILEC's costs unless the Commission changes its portability requirement). Without serving these areas, the ETCs are gaining a windfall and not competing on a neutral playing field.

Compliance with Consumer Protection Reporting Mechanisms Should be a Condition for the Determination of ETC Status.

The state commissions' ability to require a carrier to comply with consumer protection reporting mechanisms in order to be approved for ETC status is unquestioned. The Joint Board states that it "believes that states may extend generally applicable requirements to all ETCs in

²⁸ *Id.* at pp. 29-30.

order to preserve and advance universal service, consistent with section 214 and 254 of the Act.”²⁹ The Joint Board illustrated several examples of such requirements in its recommendation. In one example, the VPSB required carriers desiring ETC status to adhere to its rules regarding disconnections and treatment of customer deposits.³⁰ A second example cited by the Joint Board highlighted an Arizona requirement for ETC designation in which the Arizona Corporation Commission required a wireless carrier to submit consumer complaints arising from the company’s ETC offering.³¹ The Nebraska Companies request that the Commission reiterate the states’ right to require any ETC to comply with consumer protection requirements as a condition of ETC designation.

ETCs Should be Required to Show Progress Towards Making Their Networks Broadband Capable.

Broadband access to the internet should be treated as an evolutionary technology. In order to take advantage of the functionality inherent in Internet protocol (“IP”) transmission, broadband must be ubiquitously deployed. Realizing this fact, President Bush has recently proclaimed that all homes and businesses should be broadband-capable within the next seven years. Such an objective is difficult, though, considering that LECs will be hesitant to respond given the uncertainty in cost recovery coming from intercarrier compensation and universal service support. Companies need security in cost recovery in order to put dollars at risk investing in rural plant where demand for broadband is insufficient to promote investment without external support.

²⁹ See *Notice* at para. 64.

³⁰ *Id.* at para. 63.

³¹ *Ibid.*

While the Nebraska Companies assert that the Commission and state commissions should require ETCs to show progress towards making their networks broadband capable through the underling network receiving support, the time may not have come when broadband should be included as a supported service. Section 254(b)(3) of the Act requires reasonably comparable services be made available to consumers throughout the country at reasonable comparable rates. As the Joint Board illustrated in its Recommended Decision, the statute covers not only basic service, but also advanced telecommunications services and information services.³² Given the Commission's position on the future, ubiquitous deployment of broadband and voice over IP ("VoIP") applications, a requirement to show progress towards broadband capable networks is not onerous.

The Requirements Should be Fulfilled in a Framework of Enforceable Commitments.

The Nebraska Companies concur with the Joint Board's recommendation encouraging states to use the annual certification process for all ETCs to ensure that the federal universal service support is used to provide the supported services and for associated infrastructure costs. In addition, service commitments that are a condition of ETC status must be monitored by regular reporting of investments and coverage upgrade by support area. State commissions could require both pending and existing ETCs to fulfill these commitments by a date-certain as determined by the state commission in order to maintain ETC designation. In the interim, the state commission would regularly monitor the ETC's progress toward meeting the commitment and would be able to reduce the number of qualified USF lines if it believed sufficient progress was not being made. As an example, in the *Vermont Order*, the Public Service Board required an ETC to file reports similar to those reports required of rural LECs in the state, whereby the ETC had to demonstrate that it substantially completed its network and offered full coverage to

³² See *Three Commissioners* at p. 70.

essentially all of its service area, or that its construction spending in Vermont exceeded the sum of it federal support.³³

The States can Determine Whether an Applicant Satisfies the Additional Minimum Qualifications Without the Commission Further Developing a Record.

States can determine any additional qualifications deemed necessary for an ETC to receive federal support, while at the same time ensuring that said federal support provides the benefits for which it was intended. The *Vermont Order* establishes a record in which the state established benchmarks to determine whether an applicant satisfied any additional minimum requirements. This demonstrates that states can and do make such determinations. The Commission does not need to develop any further record on this matter.

The States Have the Authority to Re-test and Rescind ETC Status if Necessary.

The Nebraska Companies agree with the Joint Board's recommendation that where an ETC fails to comply with the requirements in Section 214(e) and any additional requirements proposed by the state commission, the state commission may decline to grant an annual certification or may rescind a certification granted previously.³⁴ For example, if at the end of the implementation period the ETC had not met each of the commitments throughout the service area, the state commission would begin the process of rescinding the carrier's ETC designation.

In the *Vermont Order*, the Public Service Board required the ETC to provide detailed evidence in the recertification proceeding regarding the scope of its effective coverage. If the Public Service Board objects to extending the ETC designation because it believes the ETC does not satisfy one or more of the ETC requirements, the Board would give the ETC an opportunity to demonstrate that ETC compliance continues. If after hearing the evidence, the ETC continues

³³ See *Vermont Order* at p. 27.

³⁴ See *Notice* at para. 79.

to meet the requirements, the Board may then renew the contested designation for an additional period.

This process of retesting ETC status could also be used to determine if the ETC in fact offers the service for which ETC designation was granted. If the ETC fails to demonstrate that it is offering or has offered to the public the service offering for which ETC status was granted, ETC designation could be rescinded. If, for example, an ETC designation was granted based on a carrier offering a fixed wireless service but the carrier had not offered said service to the public by date-certain, the state commission could and should rescind the ETC designation.

Conditioning ETC designation upon a carrier's ability to meet all of the qualifications is particularly relevant if the existing universal service funding scope of support is limited to a primary line, as the Joint Board is asking the Commission to consider. If the Commission were to adopt a primary line funding mechanism for universal service, it should require states to reexamine existing ETC designations, given the limitations on support that will very possibly exist going forward.

An Alternative Proposal that Addresses the Concerns About Universal Service Growth Should also be Considered.

In June of this year the Alliance for Rational Inter-carrier Compensation ("ARIC") introduced the concept of a State Equalization Fund ("SEF") as a means to aid in the recovery of revenues lost through the unification of inter-carrier compensation rates. The concept was presented to the Commission in a series of ex partes.³⁵ The SEF would be jointly funded by both state and federal contributions. Although the SEF would be supplemental to current funding

³⁵ See Letter from Ken Pfister, Great Plains Communications to Marlene H. Dortch, Secretary FCC, Re: In the Matter of Developing a Unified Inter-carrier Compensation Regime, CC Docket No. 01-92, et al., June 9, 2004 and June 10, 2004.

mechanisms, the proposed system would induce behaviors by regulators that would generally limit the growth in all universal service funding systems, including federal universal service support. Under the ARIC plan, there is joint federal and state funding of SEF payments, which should motivate state commissions to perform more rigorous reviews for ETC status because designation would require state funding, rather than just federal funding. Some ETC designations exist today because states were simply seeking the contribution of federal money to the state infrastructure. Adoption of the SEF proposal would work in concert with the additional minimum requirements proposed by the Joint Board to insure the most effective use of support funds. The Nebraska Companies support the ARIC proposal as a complement to the recommendations on ETC designation proposed by the Joint Board.

III. Scope of Support

In its *Recommended Decision*, the Joint Board argues that supporting a single connection is more consistent with the goals of section 254 than the present system and is necessary to preserve the sustainability of the universal service fund. It believes that a system based on a single connection would send more appropriate entry signals in rural and high-cost areas, and would be competitively neutral. In addition, it recommends that high-cost support in areas served by rural carriers be capped on a per-line basis when a competitive carrier is designated as an ETC and be adjusted annually by an index factor.³⁶ The Nebraska Companies generally oppose limiting high-cost support to a single connection, but believe that in the event that the Commission chooses to implement a single connection approach, the “Hold Harmless” proposal is the least objectionable alternative.

³⁶ See Notice at para. 87.

A Program that Generally Limits High-Cost Support to a Single Connection is not Consistent with the Goals of Section 254 of the Act.

Section 254 of the Act requires that the Joint Board and the Commission base their policies for the preservation and advancement of universal service on the following principles:

1) Quality services should be available at just, reasonable and affordable rates; 2) Access to advanced information and telecommunications services should be provided in all regions of the Nation; 3) Consumers in all regions of the Nation should have access to information and telecommunications services including advanced services and interexchange services at reasonable and comparable rates; 4) Equitable and nondiscriminatory contributions; and 5)

There should be specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service.³⁷ The institution of a single connection approach as recommended by the Joint Board would certainly fail to achieve these goals.

Quality services and access to advanced services cannot be provided at comparable rates in rural areas with the single connection approach because support would be necessarily diluted, resulting in one or all of the following: (1) prices increasing dramatically above those in urban markets; (2) service quality suffering; and/or (3) investments and maintenance being curtailed. Irrespective of the technology deployed, telecommunications networks are engineered to provide service to an entire service area, not to a series of single connections. In the case of wireline service, after a new area of a community is platted, telephone feeder and distribution is engineered to serve the entire platted area with the capacity for multiple communications paths to each residence or business. In the case of CMRS service, a tower is positioned to serve the potential subscribers in the entire cell.

³⁷ 47 U.S.C. § 254(b).

Telecommunications providers build network infrastructure, not individual lines or connections. If a large number of connections become ineligible for support, the carrier serving a rural market will be unlikely to build capacity to meet the statutory goals for access to advanced services. Service quality would not be equivalent to that provided in urban markets, where the market can sustain multiple carriers, unless prices are raised significantly above the prices for the equivalent services in urban markets in order to sustain maintenance costs. Network costs are significantly fixed and, particularly in rural markets, those costs need to be supported in order that a carrier can offer supported services and broadband access to advanced services, at prices and quality comparable to those in urban areas. It is important to note that as telephony moves from a circuit-switched network to a more packet-based IP network, the Joint Board's primary line recommendation fails to adapt to the changing needs of the universal service fund. In the IP world, universal service funding must be targeted towards network infrastructure and not specific lines.

The single connection approach also fails to meet section 254 goals in the area of predictability and sufficiency. Customer churn in response to the single connection designation will turn revenue support into a "game of dice" for the wireline carrier. Carriers will be induced to invent more and more creative ways not to capture the customer, but to capture the customer's support. Rural wireline and wireless carriers will churn the customers between them while the wireline carrier will likely continue to provide service to the customer irrespective of which carrier is designated. Since wireline and wireless carriers are not generally substitutes, a fact with which the Joint Board agrees,³⁸ customers will simply extract a better deal for their wireless service by designating their wireless carrier as their primary provider and retain their

³⁸ See Notice at para. 98.

complementary wireline service. Further, in her Separate Statement attached to the Recommended Decision, Commissioner Abernathy states that “a competitive carrier should receive support only to the extent that it wins the customer.”³⁹ The converse is that when the rural wireline carrier loses designation without losing the customer, then there should therefore be no loss of support. The Commissioner appears to support a solution where there should be no loss of funding without a loss of the customer.⁴⁰

The notion that the predictability principle requires only that rules governing distribution of the subsidies, not the funding amounts, be predictable has no foundation in reality.⁴¹ Funding amounts must be predictable and sufficient because of the fixed cost nature of networks. A single connection regime will not meet the goals of section 254 if funding is not predictable and sufficient. OPASTCO is correct when it asserts that a single connection approach will jeopardize rural customers’ access to high-quality services that are reasonably comparable to those offered in urban areas.⁴²

The Process by Which Customers Choose the Carrier that Provides the Single Connection for Purposes of Funding will be Administratively Burdensome and Inherently Biased.

The Joint Board was not persuaded by arguments that competition for primary designation would disserve the public interest by diverting ETC’s resources from infrastructure investment to marketing and promotion. It further recommended the Commission develop the record on proposals to allow customers with more than one connection to designate an ETC’s

³⁹ See Notice at Separate Statement of Commissioner Kathleen Q. Abernathy (“*Commissioner Abernathy*”) at p. 60.

⁴⁰ *Ibid.*

⁴¹ See Notice at para. 96.

⁴² See Federal State Joint Board on Universal Service, CC Docket No. 96-45, Reply Comments of the Organization for the Promotion and Advancement of Small Telecommunication Companies (“OPASTCO”) (filed June 3, 2003) at p. 20.

service as “primary.”⁴³ The Nebraska Companies respectfully disagree. The designation process for primary connections is inherently flawed, wasteful and prone to abuse. It is very doubtful that Congress envisioned a universal service system where carriers competed not for customers but for universal service support. Further, most rural LECs have their retail price regulated by state commissions and are subject to additional costs associated with required quality of service standards, while wireless carriers are currently subject to no such constraints. Without wireless ETCs being subject to the same price regulation and quality of service standards as the wireline ETC, the process of acquiring primary designation would not be competitively neutral.

Unlike the balloting process for long distance carrier pre-subscription, the ETCs cannot ballot since they have a vested interest in the outcome of the process.⁴⁴ That leaves a state commission or the Universal Service Administrative Company (“USAC”) as the most likely administrator of the balloting process. This process would be much more complicated than the current USAC process in which carriers submit qualified subscriptions. The new system would have to track each and every customer and customer location, which carrier is designated as the primary line carrier, and whether that carrier is an ETC. The system would also have to track changes and validate that a customer is not being slammed. Such a system would be significantly more complex than the current system in place at USAC. Further complicating implementation of the recommended approach is the lack of definitional integrity for the single connection concept. Should a single connection be associated with an account, a premise, a household or a business address? What happens with customers who share the same living accommodations, but not the same service? The natural question that arises is to where or to

⁴³ See Notice at para. 113.

⁴⁴ The Nebraska Companies assume that methods other than balloting, such as phone stamps or vouchers, would be even more onerous and burdensome.

whom does a customer have a single connection? The Joint Board even suggests a violation of the single connection approach when it attempts to address some of the problems associated with small rural businesses.⁴⁵ It is unlikely that a single connection definition could ever be constructed in manner that would lend itself to a practical system.

With Unresolved Issues Surrounding Intercarrier Compensation, the Adoption of a Single Connection Approach Could Devastate Rural Carriers and All Rural Customers Who Rely on Those Carriers' Facilities for Transport and Termination of Calls.

On April 27, 2001 the Commission released a Notice of Proposed Rulemaking ("ICC NPRM") in which it began a fundamental re-examination of all regulated forms of intercarrier compensation.⁴⁶ In the *ICC NPRM* the Commission sought comment on the feasibility of a bill-and-keep approach as a means to unify the flows of payments among telecommunications carriers resulting from network interconnection under the current regulatory system.⁴⁷ Furthermore, the Commission sought comment on whether a bill-and-keep approach would affect its ability to preserve and advance universal service through specific and predictable support mechanisms as required by the Act.⁴⁸ Based on its questions, the Commission was clearly aware of the interoperability between intercarrier compensation and the universal service systems. The worst of all possible outcomes for rural LECs and their customers would be the implementation of a bill-and-keep regime (or any regime that significantly reduced intercarrier compensation revenue) in concert with the institution of the single connection approach recommended by the Joint Board. Bill and Keep would shift cost recovery to the universal

⁴⁵ See *Notice* at para. 115.

⁴⁶ See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (rel. April 27, 2001) ("*ICC NPRM*").

⁴⁷ *Id.* at para. 1.

⁴⁸ *Id.* at para. 124.

service fund, which ultimately could be lost through a single connection approach. The cost recovery burden would be almost completely shouldered by the rural end-user customer if the rural LECs were unsuccessful in a marketing game on an uneven playing field for primary connection designations against carriers that are most likely not price regulated. The Nebraska Companies urge the Commission to continue to be wary of making decisions concerning universal service without consideration of impending policy changes in intercarrier compensation. Indeed, any modifications in universal service support distributions should not be implemented until after any intercarrier compensation reforms are in place.

A Single Connection Approach Will Defeat the Goal for Deployment of Broadband Access to the Internet Because of the Inherent Dilution of Support.

The Commission's Strategic Goals include the promotion of broadband availability to all Americans.⁴⁹ In a recent speech to BANC, the Chairman confirmed this by stating that "[t]he FCC's goal is to make ubiquitous and affordable broadband a reality for all Americans regardless of where they live."⁵⁰ As the Nebraska Companies argue above, the single connection approach fails to provide a predictable or sufficient funding framework due to the likelihood of significant support dilution. The level of risk engendered by the recommended system will not only provide a disincentive for future broadband investment in rural areas but will likely affect the carriers' ability to maintain the broadband plant and equipment currently deployed. Also, the Commission should not rely on assertions that unproven wireless or power-line technologies are able to provide reliable, quality broadband access to rural areas at a reduced cost so as to eliminate the need for support. These technologies have not passed the test of time and are not

⁴⁹ See *Strategic Goals Broadband*, www.fcc.gov/broadband/.

⁵⁰ *Remarks of Michael K. Powell at the Broadband Access Network ("BANC") Event*, San Francisco, California, July 12, 2004.

widely deployed in rural markets. Furthermore, wireless broadband technology will likely never be a realistic competitor to wireline broadband technology in rural areas, where wireline broadband technology is available. Wireline broadband technology is simply more reliable, scalable, and is less susceptible to security breaches. This is not to say that technologies such as Wi-Max (802.16) do not have a place in niche markets in the future, merely that wireline technology will continue to deliver the bulk of broadband access to the Internet.

The Joint Board was Split on the Recommendation to Support the Single Connection Approach.

Based on the reading of the Separate Statements, the decision from the Joint Board commissioners on adopting the single connection approach was far from unanimous. Commissioners Adelstein, Thompson, and Rowe (“Three Commissioners”) disagreed with the recommendation⁵¹ and Commissioner Martin refused to support the single connection regime unless it used the “hold harmless” option.⁵²

The Three Commissioners believe the single connection approach is inconsistent with Congress’ intent when codifying the universal service provision of the 1996 Act. They argue that there are better ways to control fund growth without imposing draconian consequences on rural customers, and these ways would better advance the long-term goal of an equitable support system that affords all Americans reasonable access to telecommunications services. They further argue that limiting support to a single connection would deny rural consumers comparable access to a variety of telecommunications services: voice, data, fixed, and mobile.⁵³ The Nebraska Companies agree with their views.

⁵¹ See *Three Commissioners* at p. 69.

⁵² See *Commissioner Martin* at p. 68.

⁵³ See *Three Commissioners* at pp. 69-70.

Commissioner Martin, apparently frustrated that the Joint Board recommendation did not include quality and type standards or add an equal access requirement to the list of additional minimum standards for ETC designation, felt compelled to adopt some means to limit fund growth. The Commissioner thus supported the single connection approach only to the extent that the “Hold Harmless” proposal was adopted.⁵⁴ As the Nebraska Companies will discuss below, the “Hold Harmless” approach, although not optimal, would be the least destructive of the single connection options.

The Nebraska Companies respectfully suggest that the Commission take into account the considerable disagreement on the Joint Board associated with the single connection approach. Clearly this represents a tenuous foundation on which to make a significant change to the universal service system.

“Hold Harmless” is the Only Single Connection Option that Both Limits Fund Growth and Provides Rural Carriers and Their Customers with a Less than Devastating Outcome.

The Joint Board recommends that the Commission take steps to avoid or mitigate reductions in the amount of high-cost support flowing to rural areas as a result of implementing a primary-line restriction.⁵⁵ To that end the Joint Board identified three alternative proposals that may achieve that goal.⁵⁶

The “Restatement” proposal will have no effect on the amount of total support received by a rural carrier at the time of restatement;⁵⁷ however, to the extent that competitive ETCs win the marketing game over time for primary connection designation, the rural carrier would lose

⁵⁴ See *Commissioner Martin* at pp. 67-68.

⁵⁵ See *Notice* at para. 103.

⁵⁶ *Id.* at paras. 104-106.

⁵⁷ *Id.* at para. 104.

significant amounts of support, most likely without losing the customers associated with that support. Given the arguments above concerning unequal price regulations and uneven quality of service costs, this outcome is likely. Without price regulation, wireless ETCs will be in a much better position to develop marketing strategies that can win the designation game. The “Lump Sum Payment” proposal suffers from the same problem as the “Restatement” proposal because high-cost support to a rural carrier will be reduced to the extent that competitive ETCs win the marketing game for the primary line designation.

The only single connection proposal that insulates rural carriers from the capriciousness of the designation game is the “Hold Harmless” proposal. This proposal will continue the support flow to rural carriers that must still provide service to the customer irrespective of which carrier wins the primary designation. It will also limit the fund growth by insuring that no more than two carriers receive support for any particular customer. Since the “Hold Harmless” proposal provides specific and predictable funding to rural carriers, it is more consistent with the goals of section 254 of the Act than the other proposals. The “Hold Harmless” proposal is also competitively neutral for ETCs actually providing competitive services (those services that are truly substitutes), and as the Joint Board argues, would eliminate the incentive for competitive carrier to seek ETC status merely for arbitrage purposes because support would not be equivalent to the incumbents’ costs.⁵⁸

One potential problem with the “Hold Harmless” proposal is related to the sufficiency requirement of Section 254. If the “Hold Harmless” proposal recommends that total high-cost support flowing to a rural carrier be capped on a per-primary line basis and indexed with the

⁵⁸ *Id.* at para. 106.

presence of a competitive ETC,⁵⁹ then support flowing to a rural carrier could be insufficient if new investments represent annual cost differences that are greater than the index. The “Hold Harmless” proposal would meet all the goals of Section 254 if indeed the total high-support received by rural carriers were left uncapped.

IV. Conclusion

The Nebraska Companies believe that to create an ETC designation process that provides consistency across the nation, the Commission should accept the Joint Board’s recommendation and adopt permissive guidelines creating additional minimum requirements to be applied by states in ETC designation proceedings. However, the Commission must recognize that these guidelines are neither all-inclusive nor binding on the states. State commissions, as the entities most familiar with the services areas in question, would still be free to require additional measures. These measures may be imposed on any carrier desiring ETC designation because section 332 of the Act does not apply to wireless carriers because ETC status is an elected condition. Adoption of the recommended guidelines would lead to a more rigorous and thorough public interest test as well as more predictable ETC application processes among states.

The Nebraska Companies also recommend the Commission expand the permissive guidelines beyond the list of supported services currently examined for USF funding. These additional guidelines include the adoption of an initial “bright line” test to identify rural service areas where a presumption should apply that scarce universal service funding cannot justify supporting multiple networks and, consequently, ETCs.

Once the “bright line” test has been conducted and it is concluded that multiple ETCs can be supported, it is necessary to apply additional guidelines and requirements to the public interest

⁵⁹ *Id.* at para. 108.

analysis conducted. For example, ETCs should be required to provide equal access to IXC's so all ETC customers have the range of choices they deserve. Other requirements for ETCs should include: 1) A requirement to demonstrate the financial resources and ability to provide quality service throughout the designated service area; 2) A capability and commitment to serve all customers; and 3) Compliance with state consumer protection reporting requirements.

Additionally, the Nebraska Companies request the Commission treat broadband access as an evolving technology. Section 254(b)(3) of the Act requires reasonably comparable services be made available to consumers throughout the country at reasonably comparable rates. Given the Commission's position on the future, ubiquitous deployment of broadband and VoIP applications, ETCs should be required to show progress towards making their networks broadband capable.

Additional guidelines also need to be created to provide a framework of enforceable commitments. The only way to ensure compliance with newly created ETC designation requirements is to have a process in place to enforce said requirements. The Nebraska Companies concur with the Joint Board's recommendation that states utilize the annual certification process for all ETCs to ensure that federal universal service support is used to provide the supported services and additional requirements as well as for associated infrastructure costs. However, they do not concur that the Commission's intervention is necessary to develop a record on whether an ETC applicant satisfies the additional minimum guidelines. States can certainly ensure that federal support provides the benefits for which it was intended. This objective is accomplished by the annual certification mentioned above as well as through using state authority to re-test and rescind existing ETC status if necessary.

Finally, the Nebraska Companies disagree with the Joint Board's recommendation that the scope of universal service support should be limited to a single connection approach. However, if the Commission elects to accept the single line approach, the Nebraska Companies believe that the "Hold Harmless" proposal is the least objectionable approach. The "Hold Harmless" approach is the only proposal which would insulate rural carriers from the capriciousness of the designation game, as well as limit universal service fund growth. In the designation game ETCs do not compete for the customer's business per se, but for the customer's primary line designation. Unlike rural LECs, wireless carriers are not subject to rate regulation and can manipulate rates as an incentive for designation as the primary line provider.

Therefore, the Nebraska Companies respectfully assert that the Commission's adoption of the proposals outlined in these comments will serve the goals of slowing the growth of the universal service fund, supporting additional ETCs where appropriate while protecting areas where it is not, and continuing availability and deployment of advanced telephony and information services.

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Respectfully submitted,

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K&M Telephone Company, Inc.,
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Northeast Nebraska Telephone Company,
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